Supreme Court, U.S.
F I L E D
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No. 85-207

In The
Supreme Court of the United States
October Term, 1985

NATIONAL DISTILLERS &
CHEMICAL CORPORATION,
Petitioner,

v.

PATRICIA L. PRATT,
Respondent.

BRIEF IN OPPOSITION TO "PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT"

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QUESTIONS PRESENTED

1. The only issue raised in the Trial Court and on Appeal to the United States Court of Appeals for the Sixth Circuit, was whether Ohio law permits the estate of a deceased worker whose death was intentionally and maliciously caused by his employer, to pursue an intentional tort action against the employer after the employee and the surviving spouse have received workers' compensation benefits.

2. No issue relating to the United States Constitution or other Federal question, was determined by the courts below, and the United States Court of Appeals for the Sixth Circuit expressly held that any claimed constitutional issues, or other issues in this case, could be raised in the District Court, on remand.

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STATEMENT OF THE CASE

Plaintiff-Respondent, Patricia L. Pratt, is the widow and administratrix of the estate of her late husband, Paul W. Pratt, who had been employed by the Defendant-Petitioner, National Distillers & Chemical Corporation, dba Emery Industries. On February 18, 1982, Mr. Pratt sustained second and third degree burns over 80% of his body in an explosion and flash fire that was intentionally and maliciously caused by his employer, the Petitioner. He died approximately six weeks later as a result thereof.

This action was filed in the United States District Court for the Southern District of Ohio, on February 17, 1983, solely on the basis of diversity jurisdiction. No questions of Federal law were alleged. Ohio law allows an action by an employee against an employer for damages caused by the intentional and malicious wrongful acts of the employer. On October 31, 1983, the Defendant filed its Motion for Summary Judgment claiming that Ohio law did not permit an intentional tort action to be maintained by the estate when the worker and his surviving spouse have received workers' compensation benefits. The Motion was granted by the Trial Court on February 22, 1984.

On Appeal to the United States Court of Appeals for the Sixth Circuit, the decision of the Trial Court was reversed on May 9, 1985. The decision of the Sixth Circuit Court of Appeals was based on *Jones v. VIP Development Co.,* 15 Ohio St. 3d 90, 472 N.E. 2d 1046 (1984), wherein the Supreme Court of Ohio directly held that a worker who has received workers' compensation benefits may also maintain a common law action against the employer based on an intentional tort.

REASON FOR DENYING THE WRIT

The Decisions Below Rest Solely Upon Ohio Law As Recently Determined By The Supreme Court Of Ohio, And No Federal Question Was Determined.

The United States Court of Appeals for the Sixth Circuit expressly stated that the only issue to be determined on appeal was one of Ohio law:

> ".... The only issue on appeal is whether Ohio law allows a tort action against an employer after the worker has accepted workers' compensation benefits." (3A).

The Court held that:

> ".... It is now Ohio law that an injured employee may sue his employer for an intentional tort after accepting workers' compensation benefits for the same injury. See *Jones v. VIP Development Co., supra.*" (2-3A).

The Court also indicated that any other issues of estoppel, or constitutional implications of a double recovery by the Plaintiff, and damages, could be raised by the Defendant in the District Court. (3A).

We respectfully submit that there having been no determination of a question of Federal constitutional or statutory law in the courts below, there is no "special" or "important reason" for this Court to grant the Defendant's Petition for a Writ of Certiorari.

———o———

CONCLUSION

For the foregoing reasons, we respectfully submit that Defendant's Petition for a Writ of Certiorari should be denied, and this matter should be remanded to the District Court for further proceedings.

Respectfully submitted,

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APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently* displayed if this decision is reproduced.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3222

PATRICIA L. PRATT,

Plaintiff-Appellant,

v.

NATIONAL DISTILLERS AND CHEMICAL CORPORATION, dba EMERY INDUSTRIES,

Defendant-Appellee.

O R D E R

(Filed May 9, 1985)

BEFORE: ENGEL and JONES, Circuit Judges; and EDWARDS, Senior Circuit Judge.

Plaintiff appeals the summary judgment for defendant in this diversity action alleging wrongful death. On April 17, 1984, this Court entered an order suspending activity on appeal pending the Ohio Supreme Court's ruling in *Gains v. Webster Manufacturing Co.*, Case No. 9-258 (11th App. Dist. of Ohio Jan. 8, 1984). Plaintiff now moves for *sua sponte* reversal of the district court's judgment based upon the Ohio Supreme Court's decision in *Gains* in the consolidated case entitled *Jones v. VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984). The appeal has been referred to a panel of this Court pursuant to Sixth Circuit Rule 9(a). Upon examination of the record and the parties' memoranda, the panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

In a diversity action, the federal court must apply state law as expressed by the highest state court. *Coleman v. Western Electric Co.*, 671 F.2d 980 (6th Cir. 1982). The district court specifically found that the Ohio Supreme Court had not ruled on the issue of whether acceptance of workers' compensation benefits precluded a tort action against the plaintiff's employer. The Ohio appellate case that the district court relied on in finding that the tort suit was barred has now been reversed by the Ohio Supreme Court. This Court must apply state law as it stands when the case is on appeal, not as it stood when the case was decided in the district court. *Awrey v. Progressive Casualty Insurance Co.*, 728 F.2d 352 (6th Cir. 1984); *see Foster v. Caterpillar Tractor Co.*, 714 F.2d 654 (6th Cir. 1983). It is now Ohio law that an injured employee may sue his employer for an intentional tort after accepting

workers' compensation benefits for the same injury. *See Jones v. VIP Development Co., supra.*

Defendant argues that it is improper to *sua sponte* reverse without allowing it an opportunity to brief the issues. This argument is not persuasive. The only issue on appeal is whether Ohio law allows a tort action against an employer after the worker has accepted workers' compensation benefits. Defendant has had ample opportunity to address this issue and in fact has filed three memoranda in opposition to the motion. Defendant was free to fully address the issue in these memoranda.

Defendant also claims that *sua sponte* reversal is improper because three issues were left unresolved by the Ohio Supreme Court in *Jones*. These issues are estoppel, the constitutional implications of a double recovery by plaintiff, and damages. Defendant can raise these issues in the district court on remand.

Therefore, it is ORDERED that plaintiff's motion for *sua sponte* reversal is granted to the extent that the district court's judgment is vacated and the case is remanded for further proceedings in light of *Jones v. VIP Development Co., supra.* Sixth Circuit Rule 9(d).

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk